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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SHILLA NASSI,

Plaintiff and Appellant,

v.

JOHN D. HARWELL,

Defendant and Respondent.

B286944

(Los Angeles County  
Super. Ct. No. BC656498)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, David L. Minning, Judge. Affirmed.

Parker Mills, David B. Parker and Steven S. Wang for  
Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, Kenneth C. Feldman and  
Barry Zoller for Defendant and Respondent.

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## INTRODUCTION

Appellant Dr. Shilla Nassi (Nassi) hired attorney John Harwell (Harwell) to file a petition for writ of administrative mandamus on her behalf. The petition was dismissed as untimely. She then sued Harwell for legal malpractice for missing the deadline. Harwell filed a motion for summary judgment and argued that Nassi could not establish the causation element of her malpractice claim, i.e., that she would have prevailed on her underlying writ petition but for Harwell's alleged malpractice.

The trial court granted summary judgment in favor of Harwell. On appeal, Nassi argues the court erred in granting summary judgment because triable issues of material fact exist as to the element of causation. We conclude the trial court did not err and affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *Nassi's Medical School Experience and Residency*

Nassi has had a history of documented illnesses since the age of 12. She reported having psychiatric problems when she was 17 years old and felt "the onset of a variety of symptoms" since the age of 20. To date, she has been (mis)diagnosed with the following physical and/or mental illnesses: idiopathic chronic urticaria, chronic tonsillitis, alopecia, hypothyroidism, Hashimoto's thyroiditis, recurrent major depression, Asperger's disorder, chronic persistent migraine disorder, chronic fatigue, hypovitaminosis D, immune thrombocytopenic purpura (ITP), systemic lupus erythematosus (lupus), and depression as a symptom of another disease. Based on her various autoimmune diagnoses, Nassi would experience episodes of intense fatigue,

“bouts of low mood,” rash/hives, swelling, dysphoria, malaise, and changes in appetite and sleep. Nassi was misdiagnosed many times until the year 2013, when she received the proper diagnosis by a rheumatologist. According to Nassi, because of “[m]ultiple physicians[] fail[ure], over years and decades, to properly diagnose” her, she “went through life and work with a significant burden of illness.”

In 1991, Nassi obtained her bachelor’s degree in chemical engineering from Stanford University. In 1993, Nassi began attending the Albert Einstein College of Medicine’s combined M.D./Ph.D. program; in 1998 she obtained a master’s degree with honors and in 2002 a Ph.D. in neuroscience. In 2002, however, she was “administratively withdrawn” from the M.D. program following two faculty committee meetings where faculty discussed Nassi’s difficulties interacting with residents, her difficulties with punctuality, and her performance of an unsupervised pelvic exam.

Subsequently, in 2004, Nassi re-entered medical school—namely, Ross University School of Medicine in the Dominican Republic. It was around this time she sought treatment with a therapist for emotional illness. In 2006, Nassi was granted two leaves of absence from school, totaling three months out of school. She continued psychotherapy sessions throughout her enrollment at Ross University and received her M.D. in 2007.

Nassi then enrolled in the four-year residency program for psychiatry at USC’s Keck School of Medicine. She attended group therapy during residency. According to Nassi, she had experienced chronic difficulty in multi-tasking, intense fatigue that would last a period of weeks, and felt that she “was really pushing the limit initially working 80 hours a week” with the

overnight calls. She described herself as having a “pretty low” mood with difficulty staying focused.

In May 2009, she was placed on probation at USC because of “inadequate performance” and “difficulties with her clinical performance.” She subsequently took a medical leave of absence from May 2009 through February 2010. While on medical leave, Nassi consulted with a number of physicians and specialists; she was diagnosed with Hashimoto’s thyroiditis, but the prescribed medication “had absolutely no effect” on her. She was then told she did not have Hashimoto’s thyroiditis, but rather, has Asperger’s; it was recommended that she have “a more routine and structured schedule with minimal changes” including “minimizing her call time since it can be very demanding.” She was also diagnosed with recurrent major depressive disorder and had tried a number of different antidepressants at this time.

After returning to the residency program, Nassi had “continued difficulties with clinical performance.” She requested accommodations from the residency program director for overnight calls, but none were provided. Based on the evaluations of her psychiatric residency, Nassi had achieved a “less than satisfactory score” on her adult inpatient rotation, made “unsafe evaluations” of patients, confused the charts of two different patients, wrote an improper 14-day hold, was not dependable, needed more supervision, asked other residents and students to do her work for her, was easily overwhelmed, had difficulty accepting feedback about her performance, and needed “improvement in professionalism, punctuality, and completion of work.” In June 2010, she was “recommended for dismissal” and thereafter was not offered a contract to commence her third year of training.

B. *Application for Medical License*

In December 2011, Nassi submitted her application for a medical license to the Medical Board of California (Medical Board or Board). She disclosed information about her education, residency, medical history,<sup>1</sup> and the circumstances of the problems she experienced during medical school and residency.

In April 2012, Nassi was diagnosed with ITP (another autoimmune disease) by a hematologist, and subsequently prescribed prednisone. Prednisone had an “immediate,” “dramatic,” and “awesome” effect on Nassi; it was as though “[s]omebody turned on the light.” Her debilitating headaches subsided and her mood and fatigue improved a great deal. Nassi realized then that she “needed to see someone who specialize[s] in autoimmune disorders,” i.e., a rheumatologist; she met Dr. Ami Ben-Artzi at UCLA, who properly diagnosed Nassi with lupus. After having taken prednisone for months, there was a dramatic improvement in Nassi’s energy, concentration, and functionality. In fact, the psychiatrist who previously diagnosed Nassi as having recurrent major depressive disorder in 2007, changed his diagnosis to indicate that “the depressive disorder that she suffered from was secondary to a medical condition.”

In June 2013, Nassi submitted to a psychiatric examination by Dr. Stuart Shipko, a certified psychiatrist appointed by the Medical Board to evaluate Nassi’s fitness for practicing medicine.

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<sup>1</sup> The Medical Board obtained Nassi’s medical information directly from her treating physicians, including her psychiatrist Adib H. Bitar, M.D., Wendy Sacks, M.D., and Moira Casillas, M.D.

He prepared a comprehensive report and ultimately concluded that Nassi would not be able to practice medicine safely with a full and unrestricted license; he believed “the degree of impairment that Dr. Nassi showed prior to stopping work is very high and represents unsafe patient care.” Dr. Shipko noted that it had been three years since Nassi practiced medicine, and that although the “[s]evere fatigue related to as yet undiagnosed lupus [was] a reasonable explanation for the sharp and serious decline in her work in the months prior to going on probation/medical leave of absence[,] [i]t is unclear what role anxiety and depression may also have played in this decline.” He opined that Nassi would not be able to practice medicine safely with an unrestricted license, and instead, stated that the following conditions were necessary for the duration of one year:

- 1) To ensure the safety of Nassi’s patients, she should be allowed “to practice only in a highly structured and supervised setting, such as a residency program.”
- 2) Nassi should submit to psychiatric examination “at least quarterly,” to help ensure patient safety.
- 3) Nassi should submit to a psychiatric re-evaluation or the attending psychiatrist must provide a written statement attesting to Nassi’s mental status and functionality prior to Nassi’s release from practicing medicine under these terms and conditions.

In July 2013, the Medical Board advised Nassi that she did not qualify for a full and unrestricted license due to the “degree of [her] physical impairment” disclosed in her application for medical license and based on Dr. Shipko’s report and

recommendation. The Board offered her a probationary license, but Nassi rejected the offer and requested an administrative hearing.

C. *Administrative Proceeding and Medical Board Hearing*

In July 2014, the Medical Board served its statement of issues (SOI) on Nassi and identified the basis of the denial of her application for an unrestricted license under Business and Professions Code section 2221:<sup>2</sup> Nassi “suffers from physical illness and/or mental illness affecting her competency to practice medicine.”<sup>3</sup>

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<sup>2</sup> All further statutory references are to the Business and Professions Code unless otherwise stated.

<sup>3</sup> The SOI set forth sections 2221, 480, and 822 in support of its denial of Nassi’s application for an unrestricted medical license, as follows:

Section 2221, subdivision (a) states the Medical Board may deny a medical license to an applicant “guilty of unprofessional conduct or of any cause that would subject a licensee to revocation or suspension” of his/her license, or may issue a probationary license subject to terms and conditions.

Section 480, subdivision (a)(3)(A) states the Board may deny a license on the grounds that the applicant has done “any act that if done by a licentiate of the business or profession . . . would be grounds for suspension or revocation of license.”

Section 822, subdivisions (c)–(d) states if the Board determines the licentiate’s ability to practice his/her profession safely is impaired because he/she is “mentally ill, or physically ill affecting competency,” then the Board may place the licentiate on probation or take any such action “as the licensing agency in its discretion deems proper.”

The administrative hearing took place on February 19 and 20, 2015. The administrative law judge heard testimony from Nassi, the Medical Board-appointed psychiatrist Dr. Shipko, Nassi's psychologist/neuropsychologist, and Nassi's rheumatologist. It also admitted various reports and letters/statements into evidence. Nassi's own treating physicians were in favor of the Board granting an unrestricted license.

One month later, on March 19, 2015, the administrative law judge issued his proposed decision and denied Nassi's application for an unrestricted license because she "suffers from physical illness and/or mental illness affecting her competency to practice medicine." Nassi was deemed as not having presented sufficient evidence to establish she could practice medicine safely with an unrestricted license; she has "chronic medical conditions for which she is receiving treatment and has not practiced medicine for three years." The administrative law judge found Dr. Shipko's testimony "credibl[e] and persuasive[ ]" in that if Nassi were to practice medicine "with the significant degree of impairment she demonstrated prior to leaving her residency at Keck, it could pose a danger to patients in her care."

On May 15, 2015, the Medical Board issued an order of non-adoption of the administrative law judge's proposed decision; it stated that a panel of the Medical Board would decide the case upon its own independent review of the evidentiary record and invited the parties to submit written arguments.

The Medical Board hearing took place on July 30, 2015, and on August 19, 2015, the Board issued its "decision after non-adoption" (Decision). It stated that "[c]ause exists to deny [Nassi's] application pursuant to sections 480, subdivision (a)(3)(A), 822[,] and 2221 because [Nassi] suffers from physical

illness and/or mental illness affecting her competency to practice medicine.” In making its determination, the Board considered Nassi’s performance during residency because the Board’s “consumer protection charge mandates that it thoroughly evaluate the entire circumstances.” Nassi’s application for an unrestricted license was denied once more; she was instead offered a probationary license for a 35-month period where she is “prohibited from practicing in an unstructured or unsupervised setting,” “prohibited from engaging in the solo practice of medicine,” and “shall undergo and complete a psychiatric evaluation (and psychological testing, if deemed necessary) by a Board-appointed . . . certified psychiatrist.” On September 18, 2015, the Medical Board’s Decision became final.

D. *Petition for Writ of Administrative Mandamus*

On September 25, 2015, Nassi retained attorney Harwell to file a petition for writ of administrative mandamus (Writ Petition) challenging the Medical Board’s Decision pursuant to Code of Civil Procedure section 1094.5. The Writ Petition was filed on October 26, 2015. It alleged the Medical Board abused its discretion in that its Decision was not supported by its findings. Nassi contended her history of (misdiagnosed) illnesses did not demonstrate that she presently could not practice medicine safely, as she was not properly diagnosed before and, as a result, was not taking the necessary medication. The Writ Petition also alleged that the Medical Board abused its discretion in that its Decision to issue a probationary license was not supported by the findings and was an excessive penalty in light of the evidence. Nassi petitioned the court to issue a peremptory writ of mandate ordering the Board to set aside its Decision and issue a full and unrestricted license in its stead.

On February 25, 2016, the Writ Petition was dismissed as barred by the statute of limitations set forth in Government Code section 11523. The deadline for the Writ Petition was October 18, 2015; Harwell filed it late—on October 26, 2015.

E. *Complaint for Legal Malpractice and Summary Judgment*

On April 3, 2017, Nassi filed a complaint against Harwell for legal malpractice. In her complaint, she alleged that “[b]ut for [Harwell’s] failure to exercise the skill, prudence and diligence exercised by other attorneys, [Nassi] would have timely filed her [Writ] Petition and been granted an unrestricted medical license.”

On July 18, 2017, Harwell filed a motion for summary judgment, contending Nassi could not satisfy the causation element of her malpractice claim as she could not establish that she would have prevailed on her Writ Petition but for Harwell’s alleged malpractice in failing to timely file it. In her opposition to summary judgment, Nassi argued the Medical Board abused its discretion in denying her an unrestricted license because “the record is devoid of any reasonable evidence showing that Dr. Nassi is presently impaired due to any mental or physical illness from safely practicing medicine.” (Italics omitted.)

At the October 2, 2017 hearing on the motion, the trial court framed the issue as “whether a court reviewing the [M]edical [B]oard’s decision would have found substantial evidence supporting the [B]oard’s finding that [Nassi] then had a cognitive or physical illness affecting her ability to practice medicine safely or competen[tly].” The court rejected Nassi’s argument that the “independent review” standard applied, and instead determined that the deferential substantial evidence standard applied. The trial court found that Nassi’s “medical school and residency

performance was troubled.” The court found there was “no dispute that [Nassi] had been diagnosed with depression and other illnesses, for which she was treating.” The court also referred evidence in the record that side effects of Nassi’s medication “potentially include anxiety and trouble thinking” and that “extreme stress could exacerbate her condition.” The trial court also referred to testimony of the Board-appointed psychiatrist when he stated that Nassi “would eventually have to discontinue taking Prednisone” and that her past attempts in doing so resulted in her feeling “shaky or shocky,” “jittery and uncomfortable,” and depressed. Nassi herself had testified that she “felt lower” and “noticed worsening headaches” when she lowered her prednisone dosage.

The trial court found that the Medical Board had “sufficient evidence to reasonably conclude that [Nassi] currently had at least one physical illness (lupus) that affected her competency” and, as such, the causation element was “conclusively negated.” The court granted Harwell’s motion for summary judgment, and held: “Given the undisputed evidence of [Nassi’s] past and current illnesses and related symptoms, combined with her poor medical school and residency performance, the [B]oard reasonably concluded that [Nassi]’s illness(es) impaired her ability to practice medicine and/or affected her competency.”

This appeal followed.

## **DISCUSSION**

The issue presented in this appeal is the propriety of the court’s grant of summary judgment. Nassi contends the trial court erred in granting Harwell’s summary judgment motion because she believes “triable issues of material fact exist” as to

the causation element of her legal malpractice claim; she argues that but for Harwell’s alleged malpractice (i.e., failing to timely file the Writ Petition), the trial court assigned to the Writ Petition matter would have overturned the Medical Board’s decision because: 1) it resulted in a violation of her procedural due process rights; and 2) it was not supported by substantial evidence.

We address each of these contentions below.

A. *Standard of Review*

We review an appeal from the grant of a motion for summary judgment de novo; “[s]ince a summary judgment motion raises only questions of law regarding the construction and effect of the supporting and opposing papers, we independently review them on appeal . . .” (*AARTS Productions, Inc. v. Crocker National Bank* (1986) 179 Cal.App.3d 1061, 1064.) We examine the record to determine whether triable issues of material fact exist and “consider[] all the evidence set forth in the moving and opposition papers except that to which objections were made and sustained.” (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 65–66.) We “liberally constru[e] the evidence in support of the party opposing summary judgment and resolv[e] doubts concerning the evidence in favor of that party.” (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460 (*Miller*).)

The moving party “bears the burden of showing the court that the plaintiff ‘has not established, and cannot reasonably expect to establish, a prima facie case.’” (*Miller, supra*, 36 Cal.4th at p. 460.) The burden then shifts to the plaintiff to show the existence of a triable issue; to meet that burden, the plaintiff cannot “rely on assertions that are ‘conclusory, argumentative[,]

or based on conjecture and speculation,’ but rather were required to ‘make an independent showing by a proper declaration or by reference to a . . . discovery product that there is sufficient proof of the matters alleged to raise a triable question of fact . . . .’ ” (*Roberts v. Assurance Co. of America* (2008) 163 Cal.App.4th 1398, 1404; see *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 274.)

Thus, we must identify the issues framed by the pleadings, determine whether the moving party has negated the opponent’s claims, and determine whether the opposition has demonstrated the existence of a triable, material factual issue. (*AARTS Productions, Inc. v. Crocker National Bank, supra*, 179 Cal.App.3d at pp. 1064–1065.) We will not, however, entertain new factual allegations or arguments on appeal that were not raised before the trial court. “ ‘[U]nless they were factually presented, fully developed[,] and argued to the trial court, potential theories which could theoretically create “triable issues of material fact” may not be raised or considered on appeal.’ ” (*Peart v. Ferro* (2004) 119 Cal.App.4th 60, 70.) A new theory may be presented for the first time on appeal where it “involves only a legal question determinable from facts which not only are uncontroverted in the record, but which could not be altered by the presentation of additional evidence.” (*In re Marriage of Priem* (2013) 214 Cal.App.4th 505, 510–511, internal quotation marks omitted.)

#### B. *Legal Malpractice*

The four elements of a legal malpractice claim are: “ ‘(1) the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection

between the breach and the resulting injury; and (4) actual loss or damage resulting from the attorney's negligence.' ” (*Ambriz v. Kelegian* (2007) 146 Cal.App.4th 1519, 1531 (*Ambriz*).) “ '[F]ailure to prove . . . any of [the elements] is fatal to recovery.' ” (*Namikas v. Miller* (2014) 225 Cal.App.4th 1574, 1581 (*Namikas*).) The trial court in the underlying proceeding found the causation element in Nassi's legal malpractice claim “conclusively negated”; as such, the question presented here is whether the evidence established the absence of any triable issue as to causation.

In a legal malpractice cause of action, “the method for proving the element of causation has been likened to a ‘trial within a trial’ or a ‘case within a case.’ ” (*Ambriz, supra*, 146 Cal.App.4th at p.1531.) This trial-within-a-trial or case-within-a-case approach “ ‘is the most effective safeguard yet devised against speculative and conjectural claims . . . . It is a standard of proof designed to limit damages to those actually *caused* by a professional's malfeasance.’ ” (*Namikas, supra*, 225 Cal.App.4th at p. 1582.) “ '[A] client claiming that his [or her] attorney was negligent in connection with litigation has . . . the difficult task of demonstrating that, but for the negligence complained of, the client would have been successful in the prosecution or defense of the action in question.' ” (*Sukoff v. Lemkin* (1988) 202 Cal.App.3d 740, 744.)

In applying the foregoing principles to the case within the legal malpractice case, i.e., Nassi's underlying Writ Petition matter, we must determine whether Nassi demonstrated a triable issue of fact as to whether the Writ Petition matter would have been decided in her favor had Harwell timely filed it.

C. *Petition for Writ of Administrative Mandamus*

Nassi sought a writ of mandate under Code of Civil Procedure section 1094.5. A petition for a writ of administrative mandamus presents “the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.” (Code Civ. Proc., § 1094.5, subd. (b); *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 810.)

Judicial review of an administrative board’s determination of an individual’s license status may be obtained by a petition for writ of mandate. (See generally Gov. Code, § 11523.) If the board’s decision affects a fundamental, vested right, the trial court exercises its independent judgment based on the administrative record when considering the writ petition. (*Patty v. Board of Medical Examiners* (1973) 9 Cal.3d 356, 367, fn. 10; *Bixby v. Pierno* (1971) 4 Cal.3d 130, 143–147 (*Bixby*).) However, if the administrative decision affects a non-vested right, the trial court’s determination is limited to whether the board’s findings are supported by substantial evidence in the administrative record and whether the agency committed any errors of law. (*Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392, 395.) “The term ‘vested’ denotes a right that is either ‘already possessed’ [citation] or ‘legitimately acquired’ [citation]. Business or professional licensing cases have distinguished between the denial of an application for a license (nonvested right) and the suspension or revocation of an existing license (vested right).” (*Id.* at p. 396.)

As the underlying administrative action here was regarding the initial “denial of a permit, license[,] or certificate (as distinguished from the suspension or revocation of a permit, license[,] or certificate previously granted), ‘the trial court should not reweigh the evidence, and its sole function is to determine from a review of the record, whether there is sufficient evidence to sustain the ruling of the board.’” (*Akopianitz v. Board of Medical Examiners* (1956) 146 Cal.App.2d 331, 334, fn. 4; see Code Civ. Proc., § 1094.5, subd. (c).) Substantial evidence “must be ‘“of ponderable legal significance,” ’ which is reasonable in nature, credible[,] and of solid value.” (*JKH Enterprises, Inc. v. Department of Industrial Relations* (2006) 142 Cal.App.4th 1046, 1057.)

Furthermore, in determining whether an applicant is qualified to practice a profession in the first instance, courts have largely deferred to administrative expertise, as courts are “relatively ill-equipped to determine whether an individual would be qualified . . . to practice a particular profession or trade.” (*Bixby, supra*, 4 Cal.3d at p. 146.) Thus, in cases involving an application for a license, “the courts uphold the agency [and/or the Medical Board’s] decision unless it lacks substantial evidentiary support or infringes upon the applicant’s statutory or constitutional rights.” (*Ibid.*, fns. omitted.)

We believe the trial court was correct in applying the deferential substantial evidence standard with respect to its review of the underlying Writ Petition, when determining whether Nassi would have prevailed in overturning the Medical Board’s decision but for Harwell’s alleged malpractice.

D. *Nassi's Procedural Due Process Argument*

Nassi argues the trial court erred in granting summary judgment because a triable issue of material fact exists as to the causation element of her malpractice claim, that is, but for Harwell's alleged malpractice in failing to file a timely petition, the trial court would have overturned the Medical Board's decision because it resulted in a violation of her procedural due process rights.

For the first time on appeal, Nassi raises a claim that her procedural due process rights were violated by the Medical Board because the Medical Board had "failed to give adequate notice and opportunity for a fair hearing." She contends that in granting Harwell's motion for summary judgment, the trial court "failed to recognize that the Board denied Dr. Nassi's application on grounds that were not identified in the SOI" and "ignored this discrepancy between the Board's SOI and its final Decision." Nassi then concludes that the trial court assigned to her Writ Petition "would have set it aside on constitutional grounds" and would have "direct[ed] the Board to issue her an unrestricted license, as requested in [her] Writ Petition."

Nassi argued in the trial court that the Medical Board abused its discretion because its Decision After Non-Adoption is not supported by the findings. On appeal, she appears to recharacterize this argument as one now based on a violation of her procedural due process rights—i.e., that the Medical Board abused its discretion because of a "material variance between the Board's charge in the SOI and its final decision to deny [her] application."

Nassi did not propound this legal theory or argument in her opposition to summary judgment nor was it set out in her

complaint for legal malpractice. Likewise, her Writ Petition cannot be fairly read as including a claim for violation of Nassi's procedural due process rights. In addition to being barred as not having been pleaded, Nassi's procedural due process theory is also barred as a new theory raised for the first time on appeal. (*Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847 ["parties are not permitted to 'adopt a new and different theory on appeal'"]).

"Generally, the rules relating to the scope of appellate review apply to appellate review of summary judgments. [Citation.] An argument or theory will generally not be considered if it is raised for the first time on appeal. [Citation.] Specifically, in reviewing a summary judgment, the appellate court must consider only those facts before the trial court, disregarding any new allegations on appeal. [Citation.] Thus, possible theories that were not fully developed or factually presented to the trial court cannot create a 'triable issue' on appeal." (*American Continental Ins. Co. v. C & Z Timber Co.* (1987) 195 Cal.App.3d 1271, 1281.) "A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." (*Ernst v. Searle* (1933) 218 Cal. 233, 240–241.)

"An exception to this rule exists, however, if the new theory raises only questions of law and is based solely on facts already in the record." (*Rickel v. Schwinn Bicycle Co.* (1983) 144 Cal.App.3d 648, 655–656.) We are not, however, required to apply this exception for purposes of considering a new theory on a pure question of law; rather, whether to do so is within our discretion. (*Greenwich S.F., LLC v. Wong* (2010) 190 Cal.App.4th 739, 767;

see also *Farrar v. Direct Commerce, Inc.* (2017) 9 Cal.App.5th 1257, 1275-1276, fn. 3 [“Merely because an issue is one of law, does not give a party license to raise it for the first time on appeal . . . . Whether an appellate court will entertain a belatedly raised legal issue always rests within the court’s discretion.”].) Accordingly, we do not exercise our discretion to entertain Nassi’s newly raised procedural due process argument. Were we to do so, our review of the record persuades us that despite any perceived defect in the notice given to Nassi, she actively litigated the relevant issues before the Board. There could not have been any misunderstanding about the factual and legal issues being litigated.

Additionally, we are further unable to consider Nassi’s newly raised claim, based on “[t]he general principle that courts should not be burdened with matters which can be adequately resolved in administrative fori, frequently expressed in the rule requiring exhaustion of administrative remedies . . . .” (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 680 (*Woods*).) An administrative agency, such as the Medical Board, “*must* be given the opportunity to reach a reasoned and final conclusion on each and every issue upon which they have jurisdiction to act before those issues are raised in a judicial forum. Our decision is limited to the narrow situation where one would be required, after a final decision by an agency, to raise for a second time the same evidence and legal arguments one has previously raised solely to exhaust administrative remedies . . . .” (*Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 510, italics added; see also *McPherson v. City of Manhattan Beach* (2000) 78 Cal.App.4th 1252, 1264.) As Nassi’s procedural

due process argument<sup>4</sup> concerns the SOI, the administrative hearing and decision, and the Board's subsequent Decision, the administrative body—i.e., the Medical Board—should have been given an opportunity to modify its own procedure and correct any errors before judicial review. (*Woods, supra*, at pp. 680–681.)

This issue could have been raised at either the administrative hearing or in the trial court. Based on the foregoing, we believe the doctrines of exhaustion of administrative remedies and waiver/forfeiture not only support our decision against exercising discretion to consider Nassi's argument, but also prevent Nassi from raising this issue for the first time on appeal.

#### E. *Nassi's Substantial Evidence Argument*

Nassi next argues that the trial court erred in granting summary judgment because a triable issue of material fact exists, such that, but for Harwell's failure to timely file the Writ Petition, she would have prevailed because the Medical Board's decision was not supported by substantial evidence.

As already mentioned in Section C of this Discussion, above, as the underlying Writ Petition involved Nassi's application to obtain a medical license (i.e., a non-vested right), the deferential substantial evidence standard applies. Thus, the Board's findings are presumed to be supported by the

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<sup>4</sup> Such a claim may be waived regardless of whether it involves constitutional ramifications. (*Lund v. California State Employees Assn.* (1990) 222 Cal.App.3d 174, 183.) The same, however, "does not apply to an action challenging the constitutionality of the administrative agency's statute." (*Ibid.*)

administrative record and the appellant challenging them has the burden to show that they are not. (*Mann v. Department of Motor Vehicles* (1999) 76 Cal.App.4th 312, 318.) We conclude that Nassi has not met this burden.

Although Nassi argues that the administrative record did not support the conclusion that she was suffering from a mental illness or that her physical illness (lupus) affected her competency, we disagree. There is substantial evidence in light of the record as a whole to support the Medical Board's determination to deny Nassi an unrestricted license. Dr. Shipko opined, based on his comprehensive review of Nassi's medical history/schooling and based on his psychiatric examination of her, that Nassi would not be able to practice medicine safely with an unrestricted license because "the degree of impairment that Dr. Nassi showed prior to stopping work is very high and represents unsafe patient care." He proposed a probationary period where Nassi may practice medicine but only while supervised. That Nassi's personal physicians came to a different conclusion about the weight to be given to Nassi's unsatisfactory performance in medical school does not negate Dr. Shipko's opinion.

Additionally, during medical school and residency, Nassi was placed on probation, took leaves of absence, and had "difficulties with her clinical performance." As Nassi had not practiced medicine and had not held a full-time job since 2010, it seems only natural to us that the Medical Board then relied on her medical school and residency in determining whether she would be able to meet the demands of the medical profession; "[i]n medical discipline cases, the 'highest priority' is protection of

the public.” (*Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 217–218.)

Although Nassi’s symptoms improved significantly once she started taking prednisone, the record contained evidence that Nassi would need to discontinue prednisone at some point “because [of] its side effects,” and that her prior attempts to lower her dosage resulted in a “recurrence of depressive symptoms.”

As our review is limited to determining whether the Board’s findings and order are supported by substantial evidence, it is not our function to reweigh the evidence or the particular factors cited by the Board in support of its decision, to which we afford considerable deference. Once we conclude, as we have, that the Board’s findings are indeed supported by substantial evidence, and that those findings in turn support the Board’s determination not to provide an unrestricted license to Nassi at this time, our analysis comes to an end.

### **DISPOSITION**

The judgment on the order granting summary judgment in favor of Harwell is affirmed. The parties to bear their own costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

STRATTON, J.

We concur:

BIGELOW, P. J.

WILEY, J.